CHAPTER 3

LITIGATION IN THE COURT OF FEDERAL CLAIMS

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CONTRACT DISPUTES ACT LITIGATION AT THE COURT OF FEDERAL CLAIMS

I. INTRODUCTION.

A. Court of national jurisdiction, established in 1855 to handle certain types of claims against the United States.

B. Jurisdiction – Suits primarily for money, arising out of money-mandating statutes, Constitutional provisions, executive orders, executive agency regulations, and contracts.

1. 33% - Government contracts.

2. 25% - tax refunds (concurrent jurisdiction with United States district courts).

3. 10% - Fifth Amendment takings, including environmental and natural resource issues.

4. 32%

a. Civilian and military pay.

b. Various claims pursuant to statutory loan guarantee or benefit programs, including those brought by states and localities, and foreign governments.

c. Congressional reference cases. 28 U.S.C. § 1492.

d. Intellectual property claims against the United States (and its contractors). 28 U.S.C. § 1498.

e. Indian Tribe claims. 28 U.S.C. § 1505.

f. Vaccine compensation claims. 42 U.S.C. § 300aa-12.

C. Limitation on Remedies

1. Generally, money damages.

2. Pursuant to the Tucker Act, the court may provide limited forms of equitable relief, including:

   a. Reformation in aid of a monetary judgment, or rescission instead of monetary damages. John C. Grimberg Co. v. United States, 702 F.2d 1362 (Fed. Cir. 1983); Paragon Energy Corp. v. United States, 645 F.2d 966 (Ct. Cl. 1981); Rash v. United States, 360 F.2d 940 (1966).

   b. "[T]o grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief" in bid protest cases. 28 U.S.C. § 1491(a)(3).

   c. Records correction incident to a monetary award, such as correcting military records to reflect a court finding of unlawful separation. See 28 U.S.C. § 1491(a)(2).

   d. Pursuant to the CDA, COFC also may entertain certain nonmonetary disputes.

3. The court may award EAJA attorneys fees. 28 U.S.C. § 2412.

D. Composition. 28 U.S.C. §§ 171-172.

1. Composed of 16 judges (and now has 13 more in senior status).

2. Chief Judge is Edward Damich.

3. President appoints judges for 15-year term with advice and consent of Senate. President may reappoint after initial term expires.

4. The CAFC may remove a judge for incompetence, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability.

E. Location.

1. 717 Madison Place, N.W., Washington, D.C. (across from White House and Treasury).

2. Routinely schedules trials throughout the country, 28 U.S.C. §§ 173 ("times and places of the sessions of the [COFC] shall be prescribed with a view to securing reasonable opportunity to citizens to appear … with as little inconvenience and expense to citizens as is practicable"), 2503(c), and 2505 ("[h]earings shall, if convenient, be held in the counties where

the witnesses reside"). The Court also conducts telephonic hearings, motions, and status conferences.

3. Unlike the BCAs, however, prior to 1992, the COFC could not conduct trials in foreign countries. 28 U.S.C. § 2505; *In re United States*, 877 F.2d 1568 (Fed. Cir. 1989). The FCAA of 1992 remedied this. See 28 U.S.C. § 798(b).

F. Case Load.

1. According to the court: "The 2,200 plus pending cases involve claims currently estimated in the tens of billions of dollars, making the average claim well over one million dollars."

2. "In fiscal year 2003, the Court disposed of 732 complaints, including 45 bid protests, and 151 petitions, and awarded judgments totaling $ 878 million on claims totaling $ 40 billion against the government."

3. Web site (includes judge's bios): http://www.uscfc.uscourts.gov//

II. HISTORY.

A. Pre-Civil War.

1. Before 1855, Government contractors had no forum in which to sue the United States.

2. In 1855, the Congress created the Court of Claims as an Article I (legislative) court to consider claims against the United States and recommend private bills to Congress. Act of February 24, 1855, 10 Stat. 612.

3. However, the service secretaries continued to resolve most contract claims. As early as 1861, the Secretary of War appointed a board of three officers to consider and decide specific contract claims. See Adams v. United States, 74 U.S. 463 (1868). Upon receipt of an adverse board decision, a contractor's only recourse was to request a private bill from Congress.

B. Civil War Reforms.

1. In 1863, Congress expanded the power of the Court of Claims by

authorizing it to enter judgments against the United States. Act of March 3, 1863, 12 Stat. 765.

2. In 1887, Congress passed the **TUCKER ACT** to expand and clarify the court's jurisdiction. Act of March 3, 1887, 24 Stat. 505 (codified at 28 U.S.C. § 1491).

   a. The court has jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). For the first time, a Government contractor could sue the United States as a matter of right.

   b. **Note**: district courts have concurrent jurisdiction with COFC to the extent such claims do not exceed $10,000. 28 U.S.C. § 1346(a)(2) (Little Tucker Act).

C. Agencies Respond.

1. Agencies responded to the Court of Claim's increased oversight by adding clauses to government contracts that appointed specific agency officials (e.g., the contracting officer or the service secretary) as the final decision-maker for questions of fact.

2. The Supreme Court upheld the finality of these officials' decisions in Kihlberg v. United States, 97 U.S. 398 (1878).

3. The tension between the agencies' desire to decide contract disputes without outside interference and the contractors' desire to resolve disputes in the Court of Claims continued until 1978.

4. This tension resulted in considerable litigation and a substantial body of case law.

D. The Supreme Court Weighs In.

1. In a series of cases culminating in Wunderlich v. United States, 342 U.S. 98 (1951), the Supreme Court upheld the finality (absent fraud) of factual and legal decisions issued under the disputes clauses by agency boards of contract appeals.

2. The Supreme Court further held that the Court of Claims could not review

board decisions de novo.

E. Congress Reacts.

1. In 1954, Congress passed the Wunderlich Act, 41 U.S.C. §§ 321-322, to reaffirm the Court of Claims' authority to review factual and legal decisions by agency boards of contract appeals.

2. At about the same time, Congress changed the Court of Claims from an Article I (legislative) court to an Article III (judicial) court. Pub. L. No. 83-158, 67 Stat. 226 (1953).

F. The Supreme Court Weighs In Again.

1. In United States v. Carlo Bianchi & Co, 373 U.S. 709 (1963), the Supreme Court held that boards of contract appeals were the sole forum for disputes "arising under" a remedy granting clauses in the contract.

2. Three years later, the Supreme Court reaffirmed its conclusion in Utah Mining and Constr. Co. v. United States, 384 U.S. 394 (1966).

3. As a result, agency boards of contract appeals began to play a more significant role in the resolution of contract disputes.

G. The Contract Disputes Act (CDA) of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. §§ 601-613).

1. In 1978, Congress passed the CDA to make the claims and disputes process more consistent and efficient.

2. The CDA replaced the previous disputes resolution system with a comprehensive statutory scheme.

H. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified 28 U.S.C. §§ 171 et seq., 1494-97, 1499-1503).

1. In 1982, Congress overhauled the Court of Claims and created a new Article I (legislative) court—named the United States Claims Court—from the old Trial Division of the Court of Claims.

2. Congress then merged the old Appellate Division of the Court of Claims with the Court of Customs and Patent Appeals to create the Court of Appeals for the Federal Circuit (CAFC).

I. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506. For legislative history, see, inter alia, S. Rep. No. 102-342, 102d Cong., 2d Sess. (July 27, 1992); H. Rep. No. 102-1006 (October 3, 1992); Senator Heflin's remarks, Volume 138 Cong. Rec. No. 144, at S17798-99 (October 8, 1992).

1. In 1992, Congress changed the name of the Claims Court to the United States Court of Federal Claims (COFC).

2. Congress expanded the jurisdiction of the COFC to include the adjudication of nonmonetary disputes.

a. The COFC has jurisdiction "to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act." Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (codified at 28 U.S.C. § 1491(a)(2)).

J. The Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No.103-355, 108 Stat. 3243 (1994), slightly altered the court's jurisdiction.

1. The COFC may direct that the contracting officer render a decision formerly, only the boards of contract appeals (BCAs) could. FASA § 2351(e), amending 41 U.S.C. § 605(c)(4).

2. District courts may request advisory opinions from BCAs. On matters concerning contract interpretation (any issue that could be the proper subject of a contracting officer's final decision), district courts may request that the appropriate agency BCA provide (in a timely manner) an advisory opinion. FASA § 2354, amending 41 U.S.C. § 609. **NB**: FASA does not permit Federal district courts to request an advisory opinion from the COFC.)

K. The Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320, § 12 (1996), significantly altered COFC and U.S. District Court "bid protest jurisdiction." See 28 U.S.C. § 1491(b).

1. Jurisdiction extends to actions "in connection with a procurement or proposed procurement" protest jurisdiction. Extends beyond "bid protests," e.g., GAO override decisions.

2. Statutorily-Prescribed Standing Requirement("interested party"). "Interested party" has same meaning as in CICA (actual or prospective bidder whose direct economic interest would be affected by an award). AFGE, AFL-CIO v. United States, 258 F.3d 1294 (2001). NB: narrower than APA definition. This means protester must submit a bid/proposal, Impresa Construcioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1334 (Fed. Cir. 2001); not be a bidder ranked below second in an agency's evaluation, United States v. IBM Corp., 892 F.2d 1006 (Fed. Cir. 1989); and be responsive. Ryan Co. v. United States, 43 Fed. Cl. 646 (1999) (citing IBM), and MCI Telecom. Corp. v. United States, 878 F.2d 362 (Fed. Cir. 1989)).

3. Empowered court to grant declaratory and injunctive relief to fashion a remedy. Monetary relief, however, is limited to bid preparation and proposal costs.

4. Granted same jurisdiction to District Courts until 1/1/2001, unless jurisdiction was renewed. It was not.

5. APA Standard of Review, 5 U.S.C. § 706.

III. PRACTICAL EFFECTS ON LITIGATION.

A. The Judge. 28 U.S.C. § 173.

1. One judge presides and decides - NO JURY TRIALS

B. The Plaintiff. RCFC 81(d)(8).

1. Individuals may represent themselves or members of their immediate family. Any other party must be represented by an attorney who is admitted to practice in the COFC.

2. Note: at ASBCA atty. not required.

C. The Defendant = “The United States.”

D. Counsel = Department of Justice (DOJ). 28 U.S.C. §§ 516, 518-519. The DOJ has plenary authority to settle cases pending in the COFC. See 28 U.S.C. § 516; see also Executive Business Media v. Department of Defense, 3 F.3d 759 (4th Cir. 1993).

1. A section of the Civil Division's Commercial Litigation Branch, located in Washington, D.C., represents the Government in all contract actions.

2. Practical Effect Upon Agency.

   a. The AGENCY loses authority over the case's disposition.

   b. This CONTRACTING OFFICER loses authority to decide or settle claims arising out of the same operative facts. The Sharman Co., Inc. v. United States, 2 F.3d 1564 (1993).

   c. AGENCY COUNSEL, because there is only one "attorney of record" per party, appears "of counsel," and plays a different role than s/he would at the board or even a district court, where SAUSA appointments are commonplace.

3. Effect of "United States" as defendant. Who is DOJ's client?

E. Applicable Law.

1. Statutes and Federal Common Law, unless matter controlled by state law, e.g., property rights.

2. *Stare Decisis.*

   a. Supreme Court.

   b. United States Court of Appeals for the Federal Circuit.

   c. United States Court of Claims. South v. xx

   d. Judges not bound by the decisions of the other COFC judges.

   e. Unpublished decisions may be cited.

3. Procedural Rules = The Rules of the Court of Federal Claims (RCFC), which are based upon the Federal Rules of Civil Procedure, and are published as an appendix to Title 28 of the United States Code.

a. Special Orders - RCFC 1 permits the judges to "regulate the applicable practice in any manner not inconsistent with these rules." Most judges have adopted specialized procedural orders, regulating enlargements of time, dispositive motions in lieu of answers, other dispositive motion requirements, mandatory disclosure, joint preliminary status reports, preliminary status conferences, discovery, experts, and submissions.

IV. COFC JURISDICTIONAL ISSUES.

A. Waiver of Sovereign Immunity.

1. Tucker Act waive sovereign immunity, but the "substantive right" claimed, whether it be the Constitution, an Act of Congress, a mandatory provision of regulatory law, or a contract, must be one which "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007-1009, 178 Ct. Cl. 599, 605-607 (1967).

B. Tucker Act - General.

1. Must be brought within six years of date claim arose. 28 U.S.C. § 2501; Soriano v. United States, 352 U.S. 270, 273 (1956); Hopland Band of Pomo Indians v. United States, 855 F.2d 1573 (Fed. Cir. 1988). This is jurisdictional.

   a. Equitable tolling: Irwin v. Veterans Admin., 498 U.S. 89 (1990)(rebuttable presumption that equitable tolling may be applied against the United States in the same manner as against private parties); Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998).

2. Generally must involve an appropriated fund activity. Furash & Company v. United States, 252 F.3d 1336 (Fed. Cir. 2001); El-Sheikh v. United States, 177 F.3d 1321 (Fed. Cir. 1999)(finding that Fed. Cl. Tucker Act jurisdiction over NAFIs is limited to claims based upon a contract, but holding that jurisdiction may be supplied through another statute waiving sovereign immunity, such as the FLSA)

3. Money claimed must be presently due and payable. United States v. King, 395 U.S. 1, 3 (1969).

4. May not also be pending in any other court. 28 U.S.C. § 1500; Loveladies

Harbor v. United States, 27 F.3d 1545 (Fed. Cir. 1994) (en banc).

5. May not grow out of or be dependent upon a treaty. 28 U.S.C. § 1502.

6. May not be brought by a subject of a foreign government unless the foreign government accords to citizens of the United States the right to prosecute claims against that government in its courts. 28 U.S.C. § 2502; Zalcmanis v. United States, 146 Ct. Cl. 254 (1959).

C. Tucker Act - Claims Founded Upon Contract.

1. Must demonstrate elements necessary to establish the existence of a contract (e.g., meeting of minds, consideration). E.g., Somali Development Bank v. United States, 205 Ct. Cl. at 751, 508 F.2d at 822; Algonac Manufacturing Co. v. United States, 192 Ct. Cl. 649, 673-74, 428 F.2d 1241, 1255 (1970); ATL, Inc. v. United States, 4 Cl. Ct. 672, 675 (1984), aff'd, 735 F.2d 1343 (Fed. Cir. 1984).

2. Must demonstrate that it was entered into by authorized Government official. E.g., City of El Centro v. United States, 922 F.2d 816 (Fed. Cir. 1990).

3. Must demonstrate "privity of contract." Erickson Air Crane Co. v. United States, 731 F.2d 810, 813 (Fed. Cir. 1984); United States v. Johnson Controls, Inc., 713 F.2d 1541, 1557 (Fed. Cir. 1983); see Cienega Gardens, et al. v. United States, 162 F.3d 1123, 1129-30 (Fed. Cir. 1998).

4. If "implied," must be implied-in-fact, not implied- in-law. Merritt v. United States, 267 U.S. 338, 341 (1925); Tree Farm Development Corp. v. United States, 218 Ct. Cl. 308, 316, 585 F.2d 493, 498 (1978); Algonac Manufacturing Co. v. United States, 192 Ct. Cl. 649, 674, 428 F.2d 1241, 1256 (1970).

5. Cannot be for the performance of covert or secret services; not all "agreements" within Congress' contemplation of contract claims under Tucker Act. Totten v. United States, 92 U.S. 105 (1875); Guong v. United States, 860 F.2d 1063 (Fed. Cir. 1988).

6. “Grants" which create formal obligations have been found sufficient for jurisdiction even though they do not appear to satisfy all elements necessary for a contract; however, Government bound only by its express undertakings. Missouri Health & Medical Organization v. United States, 226 Ct. Cl. 274 (1981); Thermalon Indust., Ltd. v. United States, 34 Fed. Cl. 411 (1995).

D. Claims Founded Upon Statute Or Regulation.

1. Civilian personnel pay claims: e.g., Equal Pay Act, 5 U.S.C. § 5101; Federal Employment Pay Act, 5 U.S.C. § 5542 et seq.; Fair Labor Standards Act, 29 U.S.C. §§ 201-219.

2. Military personnel pay claims: A service member's status in the armed forces is defined by the statutes and regulations which form the member's right to statutory pay and allowances. Bell v. United States, 366 U.S. 393 (1961). A member's status determines whether the court has jurisdiction to entertain the suit. E.g., 37 U.S.C. §§ 204, 206.

E. Claims for Money Unlawfully Exacted Or Retained Jurisdiction to entertain claim for return of money paid by claimant under protest upon grounds illegally exacted or retained. Trayco, Inc. v. United States, 994 F.2d 832 (Fed. Cir. 1993).

F. Constitutional Provisions and Statutes That Do **Not** Waive Sovereign Immunity

1. 1st, 4th, and 5th Amendments (except Takings Clause).

2. Administrative Procedure Act. Califano v. Sanders, 430 U.S. 99, 107 (1977)

3. Declaratory Judgment Act (28 U.S.C. § 2201). United States v. King, 395 U.S. 1, 5 (1969).

V. INITIATING SUIT.

A. Action Commenced With A Complaint.

1. A "short and plain" statement of jurisdiction, demonstrating entitlement, and demanding judgment for the entitled remedy. RFCF 8(a). In addition, the complaint must contain:

2. A statement regarding any action taken on the claim by Congress, a department or agency of the United States, or another tribunal, RFCF 9(h)(1);

3. A clear citation to any statute, regulation, or executive order upon which the claim is founded, RFCF 9(h)(2); and

4. A description of any contract upon which the claim is founded. RFCF 9(h)(3).

5. Compare: At BCAs, action commenced with notice of appeal.

B. Statute of Limitations.

1. Contract claims. Generally, six years. 28 U.S.C. § 2501.

2. The COFC generally considers the Clerk of Court's records of receipt to be final and conclusive evidence of the date of filing. See RCFC (3)(b). However, the court will deem a late complaint timely if the plaintiff:

a. Sent the complaint to the proper address by registered or certified mail, return receipt requested;

b. Deposited the complaint in the mail far enough in advance of the due date to permit its delivery on or before that date in the ordinary course of the mail; and

c. Exercised no control over the complaint from the date of mailing to the date of delivery. See B.D. Click Co. v. United States, 1 Cl. Ct. 239 (1982) (holding that the contractor failed to demonstrate the applicability of exceptions to timeliness rules).

C. The "Call Letter." 28 U.S.C. § 520.

1. The Attorney General must send a copy of the petition (i.e., the complaint) to the responsible military department, along with a request for all of the facts, circumstances, and evidence concerning the claim that are within the possession or knowledge of the military department.

2. The responsible military department must then provide the Attorney General with a "written statement of all facts, information, and proofs."

VI. RESPONDING TO THE COMPLAINT.

A. The Answer. RCFC 8, 12, and 13.

1. The Government must file its answer within 60 days of the date it receives the complaint.

2. The Government must admit or deny each averment in the complaint.

3. If the Government lacks sufficient knowledge or information to admit or deny a particular averment, the Government must say so.

4. If the Government only intends to oppose part of an averment, the Government must specify which part of the averment is true and deny the rest.

5. The Government may enter a general denial if it intends to oppose the plaintiff's entire complaint, including the plaintiff's averments regarding the court's jurisdiction. But see RCFC 11.

6. Generally, DOJ files bare bones admissions and denials. Compare with ASBCA practice. However, each such statement must be supportable. See discussion of Rule 11, below.

B. Defenses. RCFC Nos. 8 and 12.

1. If a responsive pleading is required, the Government must plead every factual and legal defense to a claim for relief.

2. The Government may assert the following defenses by motion:

a. Lack of subject matter jurisdiction; Lack of personal jurisdiction; Insufficiency of process; and Failure to state a claim upon which the court may grant relief.

3. The Government must plead the following affirmative defenses:

a. "accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." RCFC 8(c).

C. Counterclaims. RCFC 13.

1. The Government must state any claim it has against the plaintiff as a counterclaim if:

a. The claim arises out of the same transaction or occurrence as the plaintiff's claim; and

b. The claim does not require the presence of third parties for its

adjudication.

c. The Government may state any claims not arising out of the same transaction or occurrence as the plaintiff's claim as counterclaims.

D. Signing Pleadings, Motions, and Other Papers. RCFC 11.

1. The attorney of record must sign every pleading, motion, and other paper.

2. The attorney's signature constitutes a certification that: [T]he attorney . . . has read the pleading, motion, or other paper; that to the best of the attorney's . . . knowledge, information, and belief formed **after reasonably inquiry** it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . [emphasis added].

3. The COFC will strike a pleading, motion, or other paper if the attorney does not promptly sign it after the omission of the attorney's signature is brought to the attorney's attention.

4. The COFC will impose appropriate sanctions against the attorney and/or the represented party if the attorney signs a pleading, motion, or other paper in violation of this rule.

E. Early Meeting of Counsel. RCFC, App. G, Pt. II. The parties must meet within 15 days of the date the Government files its answer to:

1. Identify each party's factual and legal contentions;

2. Discuss each party's discovery needs and discovery schedule; and

3. Discuss settlement.

4. As a practical matter, DOJ orchestrates this.

F. Joint Preliminary Status Report (JPSR). RCFC, App. G, Pt. III.

1. The parties must file a JPSR NLT 30 days after they meet.

2. The JPSR must set forth answers to the following questions:

a. Does the court have jurisdiction?

b. Should the case be consolidated with any other action?
c. Should trial of liability and damages be bifurcated?
d. Should further proceedings be deferred pending consideration of another case? Consider 28 U.S.C. § 1500; UNR Industries. Inc. V. UnitedStates, 962 F.2d 1013 (1992), cert. granted, 113 S. Ct. 373(1992); Keene Corn. v. United States, 113 S. Ct. 2035 (1993). Subsequent interpretations of 28 U.S.C. § 1500 include: Wilson v. United States, 32 Fed. Cl. 794 (1995) (same recovery in both actions); McDermott. Inc. V United States, 30 Fed. Cl. 332 (1994) (constitutional claims and challenges to federal statutes pending in a district court action not the same as the contract actions before the COFC); Marshall Assoc. Contractors Inc. V. United States, 31 Fed. Cl. 809 (1994) (surety's suit against the United States pending in another federal court not a jurisdictional bar to contractor's suit before the COFC).
e. Will a remand or suspension be sought?
f. Will additional parties be joined?
g. Does either party intend to file a motion to dismiss for lack of jurisdiction, failure to state a claim, or summary judgment? If so, a schedule.
h. What are the relevant issues?
i. What is likelihood of settlement?
j. Do the parties anticipate proceeding to trial? If so, does any party want to request expedited trial scheduling?
k. Is there any other information of which the court should be made aware?
l. What do the parties propose for a discovery plan and deadline.

VII. BASIS FOR RESPONSE - The Litigation Report.

A. The agency is required, by statute, to file a litigation report. 28 U.S.C. § 520(b).

1. Army Regulation 27-40, paragraph 3-9 requires the SJA or legal advisor to prepare the litigation report when directed by Litigation Division. Not a Rule 4 File. Neither the CFC nor the plaintiff sees the report. Err on the side of inclusion, not exclusion. Stamp “Attorney Work Product.”

2. AR 27-40, “Litigation.” Chapter 3.9, “Litigation Reports.”

a. Statement of Facts. - a complete statement of the facts upon which the action and any defense thereto are based. Where possible, support facts by reference to documents or witness

statements. Include details of previous administrative actions, such as the filing and results of an administrative claim.

b. Setoff or Counterclaim. Identify with supporting facts.

c. Responses to Pleadings. Prepare a draft answer or other appropriate response to the pleadings. (See fig 3-1, Sample Answer). Discuss whether allegations of fact are well-founded. Refer to evidence that refutes factual allegations

d. Memorandum of Law.

a. "Include a brief statement of the applicable law with citations to legal authority. Discussions of local law, if applicable, should cover relevant issues such as measure of damages . . . . Do not unduly delay submission of a litigation report to prepare a comprehensive memorandum of law."

b. Identify jurisdictional defects and affirmative defenses.

c. Assess litigation risk. Do not hesitate to form (and support) a legal opinion. Give a candid assessment of the potential for settlement.

e. Potential witness information. "List each person having information relevant to the case and provide an office address and telephone number. If there is no objection, provide the individual's social security account number, home address, and telephone number. This is "core information" required by Executive Order No. 12778 (Civil Justice Reform). Finally, summarize the information or potential testimony that each person listed could provide." NB: DOJ probably does not care about SSNs, but REALLY cares about a witness's expected availability (retiring? PCS'ing to Greenland?)

f. Exhibits – "Attach a copy of all relevant documents . . . .Copies of relevant reports of claims officers, investigating officers, boards, or similar data should be attached, although such reports will not obviate the requirement for preparation of a complete litigation report . . . Where a relevant document has been released pursuant to a Freedom of Information Act (FOIA) request, provide a copy of the response, or otherwise identify the requestor and the records released.

g. Draft an answer.

h. Identify documents and information targets for discovery. Think about things you know exist or must exist that will help the agency position as well as things that might exist that might undermine the agency's position.

i. Consider drafting a motion to dismiss for lack of jurisdiction, RCFC 12(b)(1), or for failure to state a claim, RCFC 12(b)(4).

j. Consider drafting motion for summary judgment, RCFC 56, App. H. NB: RCFC 56(d) requires that the moving party file a separate document entitled Proposed Findings of Uncontroverted Fact, and that the responding party file a "Statement of Genuine Issues," and permits the responding party to file proposed findings of uncontroverted facts.

3. Analyze the Client.

a. If the plaintiff's position is unbelievable, there is some chance the agency has simply misunderstood it (perhaps because the position was poorly presented). Identify the questions that will assure the Government understands the contractor's point so we can target discovery, properly respond, and be assured the Government will not be blind-sided at trial.

b. Identify any agency concerns, uncertainty, hard or soft spots (the KO will fight to the death vs. the KO was surprised the contractor never called to negotiate), witness problems or biases, and anything else you would like to know if you were trying the case.

VIII. AGENCY ROLE THROUGHOUT DISCOVERY.

A. Discovery scope. RCFC 26, Appendix G ¶¶ 7-8.

B. Methods of Discovery. RCFC 26(a). The parties may obtain discovery by depositions upon oral examination or written questions, written interrogatories, requests for the production of documents, and requests for admissions.

C. The Court May Limit Discovery If:

1. The discovery sought is unreasonably cumulative or duplicative;

2. The party seeking the discovery may obtain it from a more convenient, less burdensome, or less expensive source;

3. The party seeking the discovery has had ample opportunity to obtain the information sought; or

4. The burden or expense of the proposed discovery outweighs its likely benefit.

D. Protective Orders. RCFC 26(c) and App. G. The court may make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

E. Depositions. RCFC 30.

1. Purpose – lock in testimony, pure exploration, testing a theory/confirming a negative.

   a. Need relevant documents to refresh witness's testimony and keep questioning specific.

2. Subpoenas may be served at any place within 100 miles of deposition, hearing or trial. Upon a showing of good cause, a subpoena may be served at any other place. RCFC 45(b)(2).

3. Expenses. RCFCs 28(d) and 30(g). The party taking the deposition must pay the cost of recording the deposition.

   a. Tell DOJ what you will need: disk; condensed (with word index); full. Making copies may or may not be permitted.

4. Defending Subpoenas.

   a. Agency counsel should coordinate service.

   b. If the party that gave notice of the deposition failed to attend (or failed to subpoena a witness who failed to attend), the court may order that party to pay the other party's reasonable expenses, including reasonable attorney's fees.

   c. Prior employees who acted within scope of duties are entitled to representation by DOJ. Agency counsel should identify such

circumstances and ensure DOJ forms are completed and returned.

d. DOJ should take lead in preparing witnesses, including how much and how to prepare.

e. Agency may be asked to identify relevant documents and likely questions.

f. All contact with witness must be coordinated with DOJ.

5. Submission of Transcript to Witness. RCFC 30(e).

a. The deponent must examine and read the transcript unless the witness and the parties waive the requirement.

b. The deponent may make changes; however, the deponent must sign a statement that details the deponent's reasons for making them.

c. Agency counsel should coordinate this for agency witnesses.

F. Interrogatories. RCFC 33.

1. The Government may serve interrogatories on the plaintiff after the plaintiff files the complaint, and the plaintiff may serve interrogatories on the Government after the Government receives the complaint.

2. The party upon whom the interrogatories have been served (i.e., the answering party) must normally answer or object to the interrogatories within 30 days of service.

3. The answering party may answer an interrogatory by producing business records if:

a. The business records contain the information sought; and

b. The burden of deriving or ascertaining the answer sought is substantially the same for both parties.

c. The responding party must be specific about where the information can be located. Otherwise, the burden is not the same.

4. The answering party must sign a verification attesting to the truth of the

answers. The answering party's attorney must sign the objections.

G. Requests for the Production of Documents. RCFC 34.

1. The rules are similar to the rules for interrogatories.

2. The party producing the records for inspection/copying may either:

a. Produce them as they are kept in the usual course of business; or
b. Organize and label them to correspond to the production request.

3. Exercise caution in privilege review: once they've got it, assume we can't take it back. Prepare a draft privilege list of documents withheld, providing sufficient detail to assure recipient can analyze applicability of privilege (usually, to, from, subject, and identify of sender/recipient's office (e.g., "Counsel").

H. Requests for Admission. RCFC 36.

1. The answering party must:

a. Specifically deny each matter; or
b. State why the answering party cannot truthfully admit or deny the matter.

2. The answering party may not allege lack of information or knowledge unless the answering party has made a reasonable inquiry into the matter.

3. If the answering party fails to answer or object to a matter in a timely manner, the matter is admitted.

4. Admissions are conclusive unless the court permits the answering party to withdraw or amend its answer.

I. Agency Counsel Role in Responding to Interrogatories, Requests for Production and Admissions.

1. Identify Who Should Answer.

2. Inform all potential witnesses and affected activities that a lawsuit has been filed; that, as a normal part of discovery, plaintiff is entitled to inspect and copy all related documents; that "documents" includes electronic documents, such as email and "personal" notes kept in performing official duties, such as field notebooks; that witnesses are not

to dispose of any such documents; that they should begin to collect and identify all files related to the lawsuit – including those at home.

3. Clients also should be told they are represented by DOJ and the contractor is represented by counsel, and they should not talk to the contractor or its attorneys about the lawsuit.

J. Discovery Planning Conference.

1. Agency counsel and answering witnesses should discuss with DOJ a strategy for responding. E.g.:

a. Objections in lieu of responses (what we won't tell them);

b. Objections with limited responses (what we will tell them), e.g., requests for "all documents" or "all information related to."

c. In which cases will we produce documents instead of responding to an interrogatory IAW RCFC 33(c).

d. How documents will be organized and stamped, including adoption of a stamping protocol (e.g.. "HQDA0001 . . . ," "AMC0001 . . . .") to identify source of produced documents and to identify them as having been subject to discovery effort.

e. How copying and inspection will be handled – security concerns? Cost concerns?

f. Preparation of a privilege log. All relevant documents not produced and not covered by an objection must be listed on a privilege log furnished to the other side. Typically, they list to, from, date, subject, and privilege claimed. They should be sufficiently detailed so that the basis for the privilege is evident but does not disclose the privileged matter. E.g., Ltr. From MAJ Jones, AMC Counsel, to Smith, CO re: claim.

K. Failure to Cooperate in Discovery. RCFC 37.

1. Motion to Compel Discovery. RCFC 37(a)(2). If a party or a deponent fails to cooperate in discovery, the party seeking the discovery may move for an order compelling discovery.

2. Expenses. RCFC 37(a)(4). The court may order the losing party or deponent to pay the winning party's reasonable expenses, including

attorney fees.

3. Sanctions. RCFC 37(b).

a. If a deponent fails to answer a question after being directed to do so by the court, the court may hold the deponent in contempt of court.

b. If a party fails to provide or permit discovery after being directed to do so, the court may take one or more of the following actions:

a. Order that designated facts be taken as established for purposes of the action;
b. Refuse to allow the disobedient party to support or oppose designated claims or defenses;
c. Refuse to allow the disobedient party to introduce designated facts into evidence;
d. Strike pleadings in whole or in part;
e. Stay further proceedings until the order is obeyed;
f. Dismiss the action in whole or in part;
g. Enter a default judgment against the disobedient party;
h. Hold the disobedient party in contempt of court; and
i. Order the disobedient party—and/or the attorney advising that party—to pay the other party's reasonable expenses, including attorney's fees.

c. In Mortenson Co. V. United States, 996 F.2d 1177 (Fed. Cir. 1993), the CAFC affirmed a $22 million award of attorney fees and costs against the United States as a Rule 37(a)(4) sanction for the VA's failure to comply with certain discovery orders.

IX. TRIAL.

A. Meeting of counsel. No later than 60 days before the pretrial conference, counsel for the parties shall:

a. Exchange all exhibits (except impeachment) to be used at trial.

b. Exchange a final list of names and addresses of witnesses.

c. To disclose to opposing counsel the intention to file a motion.

d. Resolve, if possible, any objections to the admission of oral or documentary evidence.

e. Disclose to opposing counsel all contentions as to applicable facts and law, unless previously disclosed.

f. Engage in good-faith, diligent efforts to stipulate and agree to facts about which the parties know, or have reason to know, there can be no dispute for the purpose of simplifying the issues at trial.

g. Exhaust all possibilities of settlement.

1. Ordinarily, the parties must file:

a. A Memorandum of Contentions of Fact and Law;

b. A joint statement setting forth the factual and legal issues that the court must resolve NLT 21 days before the pretrial conference;

c. A witness list;

d. An exhibit list.

e. 12, 13. Failure to identify an exhibit or a witness may cause the Court to exclude the exhibit or witness. Appendix G ¶¶ 10(a), 10(b), 12(a).

2. The attorneys who will try the case must attend the pretrial conference.

B. PreTrial Preparation.

1. Contacting all witnesses -- ensuring none will be gone during trial and that former Government employees have signed representation agreements if they wish to.

2. Outlining Witness Testimony.

3. Preparing Witnesses.

4. Preparing FRE 1006 summaries.

5. Copying and organizing documents.

C. Offers of Judgment. RCFC 68.

1. The Government may make an offer of judgment at any time more than 10 days before the trial begins.

2. If the offeree fails to accept the offer and the judgment the offeree finally obtains is not more favorable than the offer, the offeree must pay any costs the Government incurred after it made the offer.

X. SETTLEMENT.

A. Attorney General has authority to settle matters in litigation, 28 U.S.C. § 516, and has delegated that authority depending upon dollar value of settlement. 28 C.F.R. § 0.160, *et seq.*, .e.g., AAG, Civil Division may settle a defensive claim when the principal amount of the proposed settlement does not exceed $2 million. The AAG has redelegated office heads and U.S. Attorneys, but redelegation subject to exceptions, including case where agency opposes settlement.

1. Whether matter is "in litigation," is not always clear. The Sharman Co., Inc. v. United States, 2 F.3d 1564 (1993); Boeing Co. v. United States, Cl. Ct. No. 92-14C (June 3, 1992), reversed 92-5129, 92-5131 (Fed. Cir., March 19, 1992) (unpublished); Durable Metal Products v. United States, 21 Cl. Ct. 41, 45 (1990); but see Hughes Aircraft Co. v. United States, 209 Cl. Ct. 446, 465, 534 F.2d 889, 901 (1976). The body of law on this issue continues to develop. See, e.g. Alaska Pulp Corporation v. United States, 34 Fed. Cl. 100 (1995) (default terminations); Volmar Construction, Inc. v. United States, 32 Fed. Cl. 746 (1995) (claims and setoffs); Cincinnati Electronics Corp. v. United States, 32 Fed. Cl. 496 (1994) (default terminations).

B. Assume a Discussion About Settlement Is Coming.

1. The agency has little influence on the process when the agency counsel is not sufficiently familiar with case developments to offer a persuasive opinion.

2. Prepare your clients that ADR and, if warranted, settlement are more

arrows in the quiver for resolving the dispute.

3. Explain that settlement should be used when it avoids injustice, when the defense is unprovable, when a decision can be expected to create an unfavorable precedent; and when settlement provides a better outcome (including the fact it might include consideration that a court judgment will not) than could be expected from a trial. The availability of expiring contract funds might also be considered.

4. In that regard, help client understand difference between their believing a fact, and it being legally significant and provable.

5. Identify early on who within the agency has authority to recommend settlement, and who within the agency has the natural interest or "pull" to affect that recommendation, such that they should be continually updated on the litigation.

C. Settlement Procedure.

1. Agencies must be consulted regarding "any significant proposed action if it is a party, if it has asked to be consulted with respect to any such proposed action, or if such proposed action in a case would adversely affect any of its policies." U.S. Attorney's Manual, para.4-3.140C (available at www.usdoj.gov).

2. Litigation attorney coordinates with installation attorney and contracting officer to determine whether settlement is appropriate.

3. If settlement deemed appropriate, the litigation attorney prepares a settlement memorandum. Next the litigation attorney, submits the memorandum through the Branch Chief to the Chief, Litigation Division. The Chief, Litigation Division must approve all settlement agreements. He has authority to act on behalf of TJAG and the Secretary of the Army on litigation issues, including the authority to settle or compromise cases. See AR 27-40, paragraph 1-4d(2).

4. Finally, the recommendation of the Chief, Litigation Division is forwarded to the DOJ. Then DOJ goes through a similar process to get approval of a settlement.

XI. ALTERNATIVE DISPUTE RESOLUTION (ADR).

A. The COFC pilot program requires that designated cases be automatically referred to an ADR judge; however, the parties may opt out.

B. The court offers ADR methods for use in appropriate cases.

1. Use of a Settlement Judge.

2. Mini-Trial.

3. Each party presents an abbreviated version of its case to a neutral advisor, who then assists the parties to negotiate a settlement. Suggested procedures are set forth in the General Order.

4. Both ADR methods are designed to be voluntary and flexible.

5. If the parties want to employ one of the ADR methods, they should notify the presiding judge as soon as possible.

a. If the presiding judge determines that ADR is appropriate, the presiding judge will refer the case to the Office of the Clerk for the assignment of an ADR judge.

b. The ADR judge will exercise ultimate authority over the form and function of each ADR method.

c. If the parties fail to reach a settlement, the Office of the Clerk will return the case to the presiding judge's docket.

XII. POST JUDGMENT.

A. Unless timely appealed, a final judgment of the court bars any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy. 28 U.S.C. § 2519.

B. New Trials. 28 U.S.C. § 2515; RCFC 59.

1. The COFC may grant a new trial or rehearing or reconsideration based on common law or equity.

2. The COFC may grant the Government a new trial—and stay the payment of any judgment—if it produces satisfactory evidence that a fraud, wrong, or injustice has been done to it:

a. While the action is pending in the COFC;

b. After the Government has instituted proceedings for review; or

c. Within 2 years after final disposition of the action.

C. Appeals.

1. See generally, Jennifer A. Tegfeldt, A Few Practical Considerations in Appeals Before the Federal Circuit, 3 Fed. Cir. Bar. J. 237 (1993).

2. A party may appeal an adverse decision to the CAFC within 60 days of the date the party received the decision. 28 U.S.C. § 2522. See RCFC 72.

D. Paying plaintiff attorney fees.

1. A different attorney fee statute. The Court of Federal Claims grants Equal Access To Justice Act (EAJA) relief pursuant to 28 U.S.C. § 2412, unlike the BCAs, which grant EAJA relief pursuant to 5 U.S.C. § 504. See also, RCFC 81(e) and Appendix E of the RCFC (application form for EAJA fees).

E. Payment of Judgments.

1. An agency may access the "Judgment Fund" to pay "[a]ny judgment against the United States on a [CDA] claim." 41 U.S.C. § 612(a). See 31 U.S.C. § 1304; cf. 28 U.S.C. § 2517.

2. The Judgment Fund also pays compromises under the Attorney General's authority.

3. If an agency lacks sufficient funds to cover an informal settlement agreement, it may "consent" to the entry of a judgment against it. Bath Irons Works Corp. v. United States, 20 F.3d 1567, 1583 (Fed. Cir. 1994).

4. An agency that accesses the Judgment Fund to pay a judgment must repay the Fund from appropriations that were current at the time the judgment was rendered against it. 41 U.S.C. § 612(c).

XIII. PROCUREMENT PROTEST CLAIMS.

A. "In connection with procurement" jurisdiction (28 U.S.C. § 1491(b), *as amended by* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320 (October 19, 1996), section 12).

1. Broader than "bid protests."

2. Provide for pre and post award protests.

3. Provides the COFC with equitable powers.

4. Pre-Award decisions (injunctive relief or damages).

   a. form
   b. award

5. Post-award protests (damages and injunctive relief)

6. GAO stay override decisions. The Competition in Contract Act ("CICA"), 31 U.S.C. § 3553, requires the agency to suspend performance of the contract during the pendency of the GAO protest. 31 U.S.C. § 3553(d)(3)(A) and (B). However, CICA permits agency to override the stay provision if agency finds that continued performance is (1) in the best interests of the United States, or (2) urgent and compelling circumstances that significantly affect interests of the United States will not permit delay. Id. at § 3353(d)(3)(C).

   a. COFC may review. RAMCOR Servs. Group, Inc. v. United States, 185 F.3d 1286 (Fed. Cir. 1999). Some judges would hold that "best interests" determination is not subject to review pursuant to the APA, Found. Health Fed. Serv. v. United States, 1993 WL 738426, at *4 (D.D.C. Sept. 23, 1993); Topgallant Group, Inc. v. United States; 704 F. Supp. 265, 265-66 (D.D.C. 1988), a recent decision of the Court of Federal Claims held that it is reviewable pursuant to the court's bid protest jurisdiction, despite our argument that it is committed to the agency's discretion. PGBA, LLC v. United States, 57 Fed. Cl. 655, 659-60; but see SDS Int'l, Inc.v. United States, 55 Fed. Cl. 363, 365 (2003) (citing but not adopting decisions holding a "best interest" determination to be nonjusticiable).

B. Standard of Review. The ADRA incorporates by reference the Administrative Procedure Act's Standard of Review. 28 U.S.C. § 1491(b)(4). That is, the CFC will examine whether the agency's actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706.

1. In applying this standard, the CFC will examine whether:

   a. There was subjective bad faith by the agency;
   b. The agency decision had a reasonable basis;
   c. The amount of the agency's discretion given by statute or regulation; and
   d. The agency violated statute or regulation.

2. Even upon the demonstration of a significant error, a protester must still establish that it was prejudiced and that, but for the error, there was a substantial chance that it would have received the award. Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir. 1999) (citing Statistica, Inc. v. Christopher, 102 F.3d 1577, 1582 (Fed. Cir. 1996)).

C. Standard for injunctive relief.

1. Plaintiff will suffer irreparable harm; Plaintiff's harm outweighs the harm to the government; Public interest favors equitable relief; and Plaintiff is likely to succeed on the merits. Zenith Radio Corp. v. United States, 710 F.2d 806, 809 (Fed. Cir. 1983)).

D. The Administrative Record. Appendix C, Rules of the United States Court of Federal Claims ("RCFC") contains the court's procedures in bid protest proceedings. Paragraph VII of Appendix C provides a fairly comprehensive list of the information that should be included in the record.

1. The COFC should generally have before it the same information that was before the agency when it made its decision. Mike Hooks, Inc. v. United States, 39 Fed. Cl. 147, 154 (1997). Thus, the COFC should focus on "the 'whole record' before the agency; that is, all the material that was developed and considered by the agency in making its decision." Cubic Applications, Inc. v. United States, 37 Fed. Cl. 339, 342 (1997).

2. The COFC has permitted protesters to supplement this record through discovery in limited circumstances: "The administrative record is a post facto recreation of a procurement's documentary trail. If and when the administrative record does not, or cannot, serve to explain or defend a party's position, the record may be supplemented by other documents, including affidavits, or testimony." Alfa Laval Separations, Inc. v. United States, 40 Fed. Cl. 215, 220 n.6 (1998); see also GraphicData, LLC v. United States, 37 Fed. Cl. 771, 780 (1997). See Pikes Peak Family Hous., LLC v. United States, 40 Fed. Cl. 673, 675-79 (1998) (extensive

discussion of precedent concerning supplementation of record in bid protest, which "reject[ed] the Army's campaign to make a fortress of the administrative record." Id. at 679).

3. In deciding whether to permit the supplementation of the record, the COFC considers the eight factors articulated in Esch v. Yeutter, 876 F.2d 976 (D.C. Cir. 1989):

   a. (1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for a failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage. See, e.g., Cubic Applications, Inc. v. United States, 37 Fed. Cl. 339 (1997) (stating that protester's failure to seek to question a witness before the GAO weakened protester's contention that it was necessary to do so at the COFC).

4. GAO Proceedings - by statute, all documents that are part of a GAO protest are considered part of the record before the COFC. 31 U.S.C. § 3556. Not binding, but RCFC 34(d) permits COFC to issue a call order to GAO to issue an advisory opinion on a protest. See Howell Constr. v. United States, 12 Cl. Ct. 450 (1987).

E. Scheduling.

1. 24 hr. advance notice.
2. Scheduling Conference
3. Decide:

   a. Whether the agency can stay contract performance or award pending a hearing on the TRO/PI motion, which often happens (see, e.g., Aero Corp. v. United States, 38 Fed. Cl. 739, 746 (1997)); and

   b. Whether to consolidate final hearing on the merits with the PI hearing.

F. Protective Orders.

1. Order limiting the disclosure of source selection, proprietary, and other protected information to those persons admitted to that order. The order also governs how such information is to be identified and disposed of when the case is over. The COFC regularly issues these orders, although in at least one case, the COFC denied the request of the government and the apparent awardee to issue a protective order and ordered the release of the government's evaluation documentation relating to the protester's proposal to the protester. See Pike's Peak Family Housing, Inc. v. United States, 40 Fed. Cl. 673 (1998).

2. Once the order is issued, one gets admitted to the order by submitting an appropriate application. General Order 38 contains a model protective order and model applications for access by outside counsel, inside counsel, and outside experts.

3. Ordinarily, objections must be made within 2 days of receipt of a given application. In deciding whether to admit an applicant against whose admission an objection has been lodged, the COFC will consider:

   a. Nature and sensitivity of the information;

   b. The party's need for access to the data to effectively represent its client;

   c. The overall number of applications; and

   d. Other concerns that may affect the risk of inadvertent disclosure. See U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984) (discussing that those who give advice or participate in competitive decision-making on behalf of a party should not be admitted to protective orders).

4. COFC, DOJ, and agency personnel are automatically admitted.

5. Most judges request or accept proposed redactions from court orders and opinions and decide what protected information to redact. See, e.g., WinStar Communications, Inc. v. United States, 41 Fed. Cl. 748, 750 n.1 (1998).

XIV. THE CONTRACT DISPUTES ACT OF 1978. 41 U.S.C. §§ 601-613.

A. Applicability. 41 U.S.C. § 602.

1. The CDA applies to all express or implied contracts an executive agency enters into for:

2. The procurement of property, other than real property in being;

3. The procurement of services;

4. The procurement of construction, alteration, repair or maintenance of real property; or

5. The disposal of personal property.

B. The CDA does not normally apply to contracts funded solely with nonappropriated funds (NAFs). However, the CDA applies to Army and Air Force Exchange Service (AAFES), Navy Exchange, and Marine Corps Exchange contracts. 41 U.S.C. § 602(a).

C. Jurisdictional prerequisites:

1. Contractor has submitted a proper claim to the contracting officer.

2. OR the Government has submitted a proper claim (e.g., termination, LDs, demand for money).

3. The contracting officer has issued a final decision, or is deemed by inaction to have denied the claim. Tri-Central, Inc. v. United States, 230 Ct. Cl. 842, 845 (1982); Paragon Energy Corp. v. United States, 227 Ct. Cl. 176 (1981).

4. The COFC considers the case *de novo*. 41 U.S.C. § 609(a)(3).

D. The CDA is a waiver of sovereign immunity for the payment of interest. Interest accrues from the date the contracting officer receives the claim until the contractor receives its money.

E. Statute of Limitations.

1. Claim filing. Formerly, the general federal claim six-year limitation (28 U.S.C. § 1501) applied to the filing of complaints. No limitation applied to the filing of claims. Pathman Constr. Co. v. United States, 817 F.2d 1573, 1580 (Fed. Cir. 1987).

a. In 1994, Congress revised the CDA to impose a six-year statute of limitations on claims filing. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified at 41 U.S.C. § 605(a)).

b. Beginning with contracts awarded on or after 1 October 1995, a contractor must submit its **CLAIM** within six years of the date the claim accrues.

c. This statute of limitations provision does not apply to Government claims based on contractor claims involving fraud.

2. Complaint filing. The contractor must file its complaint in the COFC within 12 months of the date it received the contracting officer's final decision (COFD). 41 U.S.C. § 609(a)(3); RCFC (3)(b) (filing rule). See Borough of Alpine v. United States, 923 F.2d 170 (Fed. Cir. 1991).

3. Reconsideration by the Contracting Officer. A timely request made to the contracting officer for reconsideration of a decision, that results in an actual reconsideration, suspends the "finality" of the decision, and provides a new statute of limitations period. See Bookman v. United States, 197 Ct. Cl. 108, 112 (1972).

F. Consolidation of Suits. 41 U.S.C. § 609(d). The COFC may order the consolidation of suits—or transfer suits to or among agency boards of contract appeals—if 2 or more suits arising from 1 contract are filed in the COFC or 1 or more boards of contract appeals.

G. The Election Doctrine. 41 U.S.C. §§ 606 and 609.

1. The CDA provides alternative forums for challenging a contracting officer's final decision.

2. Once a contractor files its appeal with a particular forum, this election is normally binding and the contractor may no longer pursue its claim in the other forum. See Bonneville Assocs. v. United States, 43 F.3d 649 (Fed. Cir. 1994) (dismissing the contractor's suit because the contractor originally elected to proceed before the GSBCA); see also Bonneville Assocs. v. General Servs. Admin., GSBCA No. 13134, 96-1 BCA ¶ 28,122 (refusing to reinstate the contractor's appeal), aff'd, Bonneville Assoc. v. United States, 165 F.3d 1360 (Fed. Cir. 1999).

3. The "election doctrine" does not apply if the forum originally selected

lacked subject matter jurisdiction over the appeal. See Information Sys. & Networks Corp. v. United States, 17 Cl. Ct. 527 (1989) (holding that the contractor's untimely appeal to the Agriculture Board of Contract Appeals did not preclude it from pursing a timely suit in the Claims Court).

4. Contrast this with BCA practice:

   a. BCA appeals must be initiated within 90 days;
   b. Timeliness is based upon the mailing of the notice of appeal (vice receipt at COFC). 41 U.S.C. § 609(a). Structural Finishing, Inc. v. United States, 14 Cl. Ct. 447 (1988).

XV. CONCLUSION.